

ORIGINAL

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THOMAS F. McFARLAND

October 21, 2003

By UPS overnight mail

Vernon A. Williams, Secretary
Surface Transportation Board
Case Control Unit, Suite 713
1925 K Street, N.W.
Washington, DC 20423-0001

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209171

Re: Finance Docket No. 34376, *City of Creede, Colorado - Petition for Declaratory Order*

and

Docket No. AB-33 (Sub-No. 132X), *Union Pacific Railroad Company -- Abandonment Exemption -- in Rio Grande and Mineral Counties, CO*

Dear Mr. Williams:

209172

The essence of a filing made by the City of Creede, Colorado (the City) in the above proceedings on October 14, 2003 is to petition to reopen the Board's decisions of May 11, 1999 and May 24, 2000 in Docket No. AB-33 (Sub-No. 132X), *Union Pacific R. Co. -- Aband. Exempt. -- in Rio Grande and Mineral Counties, CO*. The decision of May 11, 1999 approved acquisition of the rail line in that proceeding by Denver & Rio Grande Railway Historical Foundation (the Foundation) pursuant to an offer of financial assistance (OFA). The decision of May 24, 2000 denied a petition by the City to reopen the decision of May 11, 1999 on the ground that the OFA is not valid.

Pursuant to 49 C.F.R. § 1104.13(a), replies to the City's latest petition to reopen are due on or before November 3, 2003. For the reasons identified below, the Foundation hereby requests an extension of 30 days, until December 3, 2003, to file its reply to the City's petition to reopen.

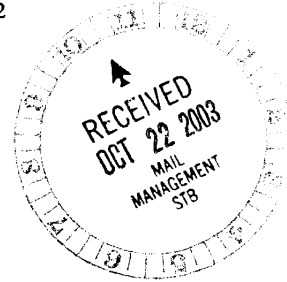
The Foundation suggests that proceedings in Finance Docket No. 34376 not go forward until there has been disposition of the petition to reopen in Docket No. AB-33 (Sub-No. 132X).

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The proceeding in Finance Docket No. 34376 involves a petition for declaratory order filed by the City on July 8, 2003 in response to an order of the United States District Court for the District of Colorado in *City of Creede v. Denver & Rio Grande Railway Historical Foundation*, No. 01-RB-318 (CBS), entered May 9, 2003, that referred specified questions to the Board. The District Court proceeding involves an attempt by the City to apply its zoning ordinance to a portion of the Foundation's railroad right-of-way in the City. The essence of the questions referred by the District Court to the Board is whether the City's action in that respect is federally preempted by virtue of 49 U.S.C. § 10501(b) and the Commerce Clause of the United States Constitution.

Paragraph 5 of the District Court's order of referral required the parties to designate, on or before July 28, 2003, copies of documents from the Court record which the parties consider relevant to the determinations to be made by the Board. The Foundation made such a designation on a timely basis. Documents designated by the Foundation relate directly to the issues referred to the Board, i.e., federal preemption of the City's zoning ordinance.

In contrast, the City obtained a number of extensions of the July 28, 2003 date for designating documents, totaling 78 days. The documents belatedly designated by the City relate virtually exclusively to the issue of the validity of the Foundation's OFA, rather than the issue of federal preemption of the City's zoning ordinance. It is evident, therefore, that the City used (actually abused) the extended period for designating documents in the federal preemption proceeding to prepare and attempt to support its petition to reopen the OFA proceeding.¹¹

In the circumstances described above, procedural fairness warrants that the Foundation be afforded adequate time to digest the extensive materials filed in support of the City's petition to reopen the OFA decisions, and to prepare a response to that petition. A 30-day extension of the date for such response is the minimum required.

The undersigned attempted without success to reach Mr. George Allen, attorney for the City, by telephone at 970-369-1000 on October 21, to determine the City's position in regard to this extension request. The undersigned left a voicemail message for Mr. Allen, advising him of the Foundation's intent to file this request. Mr. Allen called back later that day from out of the country. He stated that he would likely know by October 23 whether the City will oppose this requested extension.

¹¹ The Foundation predicted that the City would use the preemption proceeding as a vehicle to attack the OFA. See the Foundation's filings in Finance Docket No. 34376 dated July 9, 2003 and July 14, 2003.

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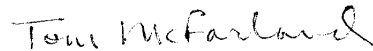
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Please notify the undersigned of disposition of this requested extension.

Very truly yours,

A handwritten signature in cursive script that reads "Tom McFarland".

Thomas F. McFarland

*Attorney for Denver & Rio Grande
Railway Historical Foundation*

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cc: Mr. George Allen
Mr. Don Shank